ved. Therefore, in round figures the award under this head is $13,000.

The Retirement Fund, Group 9, figure was $160,207. I will discount this by 2/5 in the same way. This leaves $96,160 of which $25,176 has already been paid. I will round that to $71,000.

To summarize the various amounts. The pre-trial figure is $23,200 + $2,750 funeral expenses which is $25,950 which I round up to $26,000.

Loss of expectation of life has been agreed at $5,000. That gives a total of $31,000 pre-trial loss.

The lost years calculation is $260,000 + $84,000 on the Provident and Retirement Fund which is $344,000. That gives a total of $375,000. From this must be deducted one-quarter, in view of my finding of the respective degrees of negligence. That means a deduction of $93,750 which leaves $281,250. There will be 6% interest from death to judgment on the pre-trial amount of $19,500; and 2% on the $3,750 for loss of expectation of life, from the writ to the judgment. No interest on the lost years award or on the Provident and Retirement Fund awards.

Plaintiff to have costs.

Amount to be paid within 21 days.

Order accordingly.

Solicitors : *Choo Chan & Wong; David Clidero & Co.*

GELAU ANAK PAENG v. LIM PHEK SAN & ORS.

[O.C.J. (Roberts C.J.), January 28 & 29, 1985]
[Kuala Belait – Suit No. 152 of 1984]

Employment – Worker injured – Common law duty of care to protect worker – Contributory negligence – Damages.

Tort – Negligence – Common law duty of care – Plaintiff, 29, a labourer – Right hand injured in roller of brickworks – Contributory negligence.

Damages – Right hand injured – Permanent loss of capacity of 16% – Apportionment of liability – Interest on award.

The plaintiff, an Iban aged 29 at time of accident on July 13, 1981, was employed by the defendant at the Andulau Brickworks as a labourer. He was instructed by the defendants to clean the rollers with a stick with the engine on not only the one where his hand was injured, but the other rollers which operated in the same or in other conveyor belts in the brickworks. The defendants did not dispute that the plaintiff was found with an injured hand caught in the roller but they contended that it was extremely difficult, if not impossible, for that roller to have been cleaned with a stick. The plaintiff was hospitalized for 17 days with a return for 3 days a week after his first release. There was a degree of loss of movement in the right wrist and a somewhat ugly scar. Such improvement as was likely in the wrist would already had taken place 3½ years after the accident. The specialist Dr. Nyun was of opinion that there had been a permanent loss of capacity of 16%. The average earnings of the plaintiff, both before and after the accident, seemed to be about $500 a month.

Held: (1) the common law duty of an employer is to take reasonable precautions to protect his workers against danger. He is not required to insure them and to protect them against all risks of any kind but he is obliged to provide a reasonably safe system of work and to take reasonable care for his employees;

(2) there is a breach of the employer's common law duty to take reasonable steps to protect his workers. The plaintiff himself showed a considerable degree of disregard for his own safety and was ¼ liable for the fault, while the defendants were ¾ liable;

(3) the awards are as follows: (a) $60 for special damages, (b) $10,000 for pain and suffering, (c) $14,400 for loss of earning capacity. A quarter has to be deducted from the total of $24,460, thus giving a net award of $18,345. There will be interest on special damages at 3% from date of accident till date of judgment, and at 6% on the award for pain, suffering and loss of amenities from date of service of writ to date of judgment. No interest is due on the award for loss of earning capacity. There will be interest at 6% on the total amount due to the plaintiff, starting 21 days from date of judgment. Costs to be taxed if not agreed.

CIVIL SUIT.

Daljit Singh Sandhu for the plaintiff.
S.P. Wong for the defendants.

Cur. Adv. Vult.

Roberts C.J.: The plaintiff is an Iban aged 29 at the time of the accident, which took place on July 13 1981, when the plaintiff was employed by the defendants at the Andulau Brickworks as a labourer. His tasks were primarily those of digging and moving clay, which was later to be made into bricks, and in helping with the stacking and movement of the bricks themselves. As to this, there is no dispute.

There is, however, a conflict between the plaintiff and his witnesses and Mr. Lim Pek Tan, the 3rd defendant, who was effectively in charge of the brickworks, as to whether or not the plaintiff was also required by Mr. Lim to clean the rollers on the moving belts which conveyed the clay round the factory building.

According to the plaintiff, he cleaned the rollers as part of his overtime work on the instructions of his boss, which is how he referred to the 3rd defendant, who told him that he must switch on the engine before cleaning the rollers, because the wet earth, which caught in the rollers, could not be effectively moved unless they were turning.

The boss also gave him a stick with which to remove the mud. He identified a stick about 3 feet long, looking rather like a section of paling, as the kind that he used to poke out the mud. He was insistent that his boss had never warned him not to go near the machines. He was never scolded by the boss for using a stick to clean the rollers, since the boss himself told him that that was how he was to clean them. He was given no other kind of appliance to carry out this task.

This evidence is in essence supported by two other workers who formed with the plaintiff part of the same team in the brickworks. Lawrence Raman, who has worked there since 1981 and was employed on the same task as the plaintiff, said that he also had used sticks of the same nature to clean the rollers on the instructions of the boss who usually started the engine in order that the rollers could be cleaned. The boss often saw him cleaning the roller with the engine on but never asked him not to do it.

Similarly, Hari Seruji, another Iban worker, who started working there over two years before the accident, said that he was employed in a similar capacity. He also was instructed to clean the rollers, by using a piece of wood like the one exhibited. The boss always started the engine, often saw him cleaning rollers with a stick and indeed had told him to do it like that.

The 3rd defendant, Mr. Lim Pek Tan, told another story. He said that the only way to clean the rollers was by the adjustment of a metal plate which was alongside the rollers. By the use of a spanner, the metal plate could be brought closer to the roller, so that as the roller revolves, the mud is removed from it by the sharp edge of the metal plate. He never told anyone to clean the rollers by means of a stick and never saw any workers trying to clean them in that way.

With regard to the accident, which occurred on the early evening of July 13, it is not disputed that the plaintiff's lower right arm was in some way trapped between the roller and the metal plate.

According to the plaintiff he was cleaning the roller, with the engine switched on, with a stick. This fell out of his hand and his hand went into the roller. His boss saw this and switched off the engine.

The defendant did not dispute that the plaintiff was found with an injured hand caught in the roller which is at the end of the conveyor belt.

However, he asserted that it was extremely difficult, if not impossible, for that roller to have been cleaned with a stick. He based this view on the fact that walls were constructed on either side of the roller, which did not leave much space between the walls themselves and the sides of the roller.

While it may be that is a matter of impression since I have seen the site but have not been given any measurements, I accept that the stick was longer than the gap between the side of the roller and the wall. But this would not have prevented the plaintiff from inserting the stick at the back of the roller although the confined space in which he would have had to work would have made it a difficult and hazardous task.

The plaintiff and the two witnesses who supported him seemed to me to be simple men, whose recollections after this long passage of time were in some respects unreliable. Nevertheless, I think that, in general, they were attempting to tell the truth as they remember it.

I accept their evidence that the boss did give them instructions to clean the rollers, not only the

one where the injury took place, but the other rollers which operated in the same or in other conveyor belts in the brickworks.

I accept their evidence that he told them that the cleaning must be done with the engine on and rollers moving and that he told them that they should use the kind of stick which they say they did use.

It is agreed that no precaution of any kind was taken by the defendants to protect the workers against injury in carrying out this task. There was no sort of trail or guard to protect them against the turning of the rollers and there were no warning notices.

Indeed, I accept the plaintiff's evidence that the work which he undertook was encouraged by the boss and that there was no warning given by him as to the dangers involved.

The common law duty of an employer is to take reasonable precautions to protect his workers against danger. He is not required to insure them and to protect them against all risks of any kind but he is obliged to provide a reasonably safe system of work and to take reasonable care for his employees.

For the reasons which I have given, the defendant must have known that the work of cleaning the rollers with a piece of wood when the engine was switched on contained a considerable element of danger. Yet, nothing was done to protect the employees from it.

I therefore find that there is a breach of the employer's common law duty to take reasonable steps to protect his workers.

However, I think that the plaintiff himself showed a considerable degree of disregard for his own safety. The roller, which he was seeking to clean when he was injured, was in a confined space where he must have realized that the risk was more substantial than elsewhere.

Both he and the other workers had been cleaning the rollers for sometime before the accident without mishap and I think a degree of responsibility for this accident must be attributed to the plaintiff himself. It is always a matter of great difficulty to apportion blame, but I will attribute one-quarter of the fault to the plaintiff himself and three-quarters to the defendants.

I have to turn now to the question of special damages. First, the plaintiff claimed $25 special damages for a medical report which, during the course of the trial, counsel agreed should be costs in the action. Secondly, he claimed $150 transport charges for visits to the hospital for treatment. I find that the plaintiff made 15 visits for treatment, (his own number) and that he should be allowed the return bus fare for each trip *i.e.* $60. Thirdly, he claimed for loss of earnings from July 14, 1981 at an average income of $500/– per month.

The plaintiff's evidence was that he received $400 in August, $150 in September, nothing in October, November and December and that the $550 was later regarded by the boss as a loan and deducted from his wages.

However, the defendants produced written records of wages paid during 1981 which tell a very different story. These are, to some extent, supported by individual work cards also produced by the defendants. I accept these as genuine documents.

They show that during the five months when the plaintiff said he received nothing, he received $1445. Mr. Lim explained that this would be slightly less than the wages paid to other members of his team because the others did overtime whereas, because he was not fully fit, the plaintiff did not do any in those months. The cash accounts show that Lawrence Raman earned $1,629 in the five months and Hari Seruji, $2,518. I accept the defendants' evidence as to earnings and find that the plaintiff has not established that he lost any wages during the period for which they are claimed.

I turn to damages for pain and suffering and loss of amenities. I have been referred to various cases which were reported in the *Malayan Law Journal* or in Mr. Dass' useful book. These show a range for fractures of the ulna of about $4,500 to $15,000.

The injuries which the plaintiff sustained must have been painful at the time. He was admitted to hospital and detained for a period of 17 days with a return for 3 days a few weeks after his first release. He still, according to him, suffers an amount of pain when he raises his arm, or when he puts strain on it.

There is a degree of loss of movement in the

right wrist and a somewhat ugly scar. The specialist, Dr. Nyun, agreed that such improvement as was likely in the wrist would already had taken place 3½ years after the accident. I will award a sum of $10,000 under this head.

So far as the loss of earning capacity is concerned, this is part of general damages and although Mr. Wong submitted to me that a claim for such loss should be separately and specially pleaded, I do not think that this is so.

Dr. Nyun's opinion was that there had been a permanent loss of capacity of 16% and I see no reason to differ from this figure.

The plaintiff gave evidence that his grip had been weakened, that his arm gives him some pain and that he is unable to lift heavy weights. This accords with Dr. Nyun's evidence.

The average earnings of the plaintiff, both before and after the accident, seem to me to be about $500 a month. Taking 16% of this, we get a figure of $80 per month or $960 a year. He was aged 29 at the time of the accident and 33 this year. He is doing unskilled work as a labourer and I suppose that he would normally expect to be able to continue doing such work until his early 50s.

On the basis of the usual figures used as multipliers, I think that 15 is the correct one to apply. This gives a figure of $14,400 for loss of earning capacity. We thus have $60 for special damages, $10,000 for pain and suffering, $14,400 for loss of earning capacity. This is a total of $24,460. A quarter has to be reduced from this, which reduces it to $18,345.

There will be interest at 3% on the award of special damages from the date of the accident (July 13, 1981) till today and at 6% on the award for pain, suffering and loss of amenities from the date of service of the writ (July 26, 1984) to today. No interest is due on the award for loss of earning capacity. There will be interest at 6% on the total amount due to the plaintiff, starting 21 days from today. Costs to be taxed if not agreed.

Order accordingly.

Solicitors: *Sandhu & Co.; Choo, Chan & Wong.*

BORNEO INSURANCE SDN. BHD. v. MARTIN LOH

[O.C.J. (Roberts C.J.) February 6 & 7, 1985]
[Bandar Seri Begawan – Suit No. 12 of 1984]

Contract – Agency agreement – Claim for insurance premiums collected by agent – Agent did not challenge monthly statements.

Insurance – Premiums – Agency agreement – Claim against agent for premiums collected.

The plaintiff, an insurance company, claims against the defendant for premiums totalling $29,587.35 collected by the defendant as its agent under an agency agreement dated August 20, 1982. Under paragraph 8 of the agreement, the defendant should within 14 days from receipt of the monthly statements from the plaintiff give written notice of any item disputed by him, failing which the balance due from the defendant was assumed to be confirmed as correct by him. The plaintiff's sole witness, its marketing manageress, one Miss Pauline Tan, gave evidence that the amount due from the defendant to the plaintiff was $29,587.35. He received personally from her all the monthly statements from August 1982 to September 1983. At no time did he challenge any of the monthly statements which he received; including the sum of $9,809 brought forward.

Held: (1) the defendant did not exercise his right to challenge the amount brought forward and that the amount of $9,809 is covered by paragraph 8 of the agency agreement;

(2) the learned trial judge was satisfied that the defendant owed the sum of $29,587.35. Judgment with costs for this sum was entered for the plaintiff, with interest at 6% from October 1, 1983.

CIVIL SUIT.

Oliver Phipps for the plaintiff.
Raymond Szetu for the defendant.

Cur. Adv. Vult.

Roberts C.J.: The plaintiff is an insurance company, which is incorporated in Brunei, with a registered office in Bandar Seri Begawan. Its claim is against the defendant, Martin Loh, under an agency agreement, which is dated August 20, 1982.

Under the terms of this agreement, the plaintiff appointed the defendant as one of its agents to transact motorcar insurance, on behalf of the plaintiff, the defendant being a motorcar salesman with a very good reputation.

According to the Statement of Claim, the defendant acted as the plaintiff's agent in accordance with the agency agreement, but failed, in